

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
NORTHSTAR TECHNOLOGY, LLC)
Request for Waiver and Extension of the)
Broadband PCS Construction Requirements)

ORDER

Adopted: June 7, 2002

Released: June 10, 2002

By the Deputy Chief, Commercial Wireless Division, Wireless Telecommunications Bureau:

1. In this Order, we address a request by Northstar Technology, LLC (Northstar) for waiver and extension of time to meet the construction requirement for two of its broadband Personal Communications Services (PCS) licenses. For the reasons set forth below, we grant Northstar an additional four months to meet the construction requirement as modified herein.

2. Since late 2000, Northstar has acquired a number of broadband PCS licenses, including the authorizations for the F-Block in the following two Basic Trading Areas (BTAs): Middlesboro-Harlan, KY BTA (BTA295) and Somerset, KY (BTA423). Pursuant to section 24.203(b) of the Commission's rules, 10 MHz broadband PCS licensees, which includes F-Block licensees, are required to provide service to at least one-quarter of the population of their BTAs, or make a showing of substantial service, within five years of initial license grant. Failure to comply with the construction requirement would result in automatic termination of the license. The five-year deadline for the instant licenses was April 28, 2002. Approximately one month before the deadline, Northstar filed an extension request, asking for an additional six months (i.e., from April 28, 2002 to October 28, 2002) to complete construction of these two BTAs in rural and suburban Kentucky. Northstar subsequently filed a supplement to its extension request providing further information on its construction progress.

3. Without grant of extension of time or a waiver of the PCS construction rule, Northstar's licenses automatically terminated as of the April 28, 2002 construction deadline for failure to meet the

1 See FCC Form 601 filed by Northstar Technologies, LLC on March 26, 2002, "Exhibit 1 - Limited Waiver and Extension of Time to Construct" (Extension Request).

2 The call signs for the Licenses are KNLH637 and KNLH638, respectively.

3 47 C.F.R. § 24.203(b).

4 See 47 C.F.R. § 24.203(b).

5 Extension Request at 2.

6 See Letter to Scott Mackoul, Esq., Federal Communications Commission, Wireless Telecommunications Bureau, from Thomas Gutierrez and Todd Slamowitz, counsel for Northstar, dated May 8, 2002 (Supplement). In the Supplement, Northstar also added a third license (the F-block for Corbin, KY BTA) to its extension request. We will address the extension request for the third license by separate Order.

construction requirements. Pursuant to sections 1.946(e) and 24.843(b) of the Commission's rules, an extension of time to meet the construction requirements may be granted if the licensee timely makes the request and demonstrates that the failure to complete construction is due to causes beyond its control.⁷ Moreover, the Commission has stated that, in situations in which the circumstances are unique and the public interest would be served, it would consider waiving the PCS construction requirements on a case-by-case basis.⁸ Pursuant to section 1.925 of the Commission's rules, waiver may be granted if the petitioner establishes either that: (1) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that grant of the waiver would be in the public interest; or (2) where the petitioner establishes unique or unusual factual circumstances, application of the rule would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.⁹

4. In this case, we find that the totality of the record supports a limited waiver of section 24.203(b) of the Commission's rules to allow Northstar a brief extension of time to meet the five-year construction requirement for the two licenses. First, the two BTAs in question are small markets in terms of population and population density,¹⁰ and Northstar proposes to bring service to small towns and rural areas within the BTAs that are not readily served by other commercial wireless carriers.¹¹ Our research found that the vast majority of the population in the nine counties that comprise the two BTAs lives in "rural" areas, as set forth by the Census Bureau.¹² As expected, rural markets are more likely to be underserved, as compared to more urban areas, by virtue of their sparse population.¹³ Northstar's proposed service to rural areas within these BTAs is consistent with statutory and Commission policy directives to ensure service to rural areas using licenses that are awarded through competitive bidding,¹⁴ Commission statements encouraging PCS service to rural areas,¹⁵ and recent action by the Wireless Telecommunications Bureau's Commercial Wireless Division on similar requests for extension of time

⁷ See 47 C.F.R. §§ 1.946, 24.843. Section 1.946(e) includes examples of specific circumstances that would not warrant an extension of time to complete construction. 47 C.F.R. § 1.946(e)(2)-(3).

⁸ *PCS MO&O* at 5019, citing *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

⁹ 47 C.F.R. § 1.925. Alternatively, pursuant to section 1.3, the Commission has authority to waive its rules if there is "good cause" to do so. 47 C.F.R. § 1.3. See also *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990).

¹⁰ Our research indicates that the two BTAs are in the lower third of all BTAs in terms of population. The upper two-thirds of BTAs in terms of population represent approximately 96% of the total U.S. population. Moreover, of the nine counties that comprise the two BTAs, all but one county are outside the top 1000 counties in terms of population, with the top 1000 counties make up approximately 86% of the total U.S. population. Our analysis herein focused on the 487 BTAs encompassing the 50 States and is derived from the 1990 U.S. Census. We note that there are an additional six BTAs that make up U.S. territories and possessions.

¹¹ Extension Request at 5.

¹² The range of population living in "rural" areas (as defined by the Census Bureau) is from Bell County, KY, which has 64% rural population to Casey County, KY, McCreary County, KY, and Russell County, KY, all of which are considered to have 100% rural population. This information was calculated from the 1990 U.S. Census, found on the Census Bureau's website (www.census.gov).

¹³ See, e.g., Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Sixth Report*, FCC 01-192, Appendix C, Table 5 (rel. Jul. 17, 2001) (demonstrating that, of the lower quartile of counties in terms of population, only 18.0% have 3 or more mobile telephone providers compared to 93.2% of the highest quartile of counties).

¹⁴ See 47 U.S.C. § 309(j)(4)(B).

¹⁵ See, e.g., *PCS MO&O* at 5018 ("ensure that PCS service is made available to as many communities as possible and that spectrum is used efficiently").

involving rural and sparsely-populated areas.¹⁶ Moreover, as we have noted in other extension requests,¹⁷ even to the extent that some commercial wireless carriers are serving parts of these BTAs, Northstar's proposed service to rural areas will benefit consumers in terms of choices available to them and will likely promote vigorous competition in the marketplace.

5. Second, prior to the deadline, Northstar did a significant amount of work toward meeting the coverage requirement despite only recently acquiring these licenses and experiencing unanticipated delays with acquiring network equipment. Northstar acquired these two licenses in mid-March 2002, less than two months from the construction deadline.¹⁸ Prior to that, Northstar applied, and was approved, for a loan from the Rural Utility Service (RUS) in September 2001 and entered into a network equipment supply agreement with Nokia in October 2001.¹⁹ According to Northstar, however, it learned in January 2002 that Nokia reversed its decision to work with Northstar because it was acquiring its financing through RUS.²⁰ Northstar states that it was then forced to find a new vendor, only three months prior to the construction deadline.²¹ Despite this unexpected event, Northstar quickly found a new equipment vendor,²² and, to the extent possible, has been constructing its system.²³ We believe that Northstar's diligence in constructing a digital wireless network in these two BTAs, despite the short time it has held the licenses and its unanticipated problems with its equipment vendor, demonstrates Northstar's commitment to providing service to these rural BTAs.

6. Based on the foregoing reasons, we find that a limited extension is warranted to allow Northstar to meet the construction benchmark set forth in section 24.203(b). Northstar has requested an additional six months, but has also indicated that it has already constructed nine sites in the two BTAs that, once operational, will cover 25 percent of the population of the two BTAs.²⁴ Because all the sites necessary to meet the coverage benchmark are constructed, we believe that four months is a sufficient amount of time to comply with the construction requirements set forth herein. An extension of four months is also consistent with other recent extensions of the PCS construction period.²⁵ Therefore, we

¹⁶ See, e.g., Leap Wireless International, Inc., Request for Waiver and Extension of Broadband PCS Construction Requirements, *Memorandum Opinion and Order*, 16 FCC Rcd. 19573, 19577 (WTB Comm. Wir. Div. 2001) (*Leap*).

¹⁷ See, e.g., Trustee in Bankruptcy for Magnacom Wireless, LLC, and Telecom Wrap Up, Group, LLC, *Order*, DA 02-1243 (rel. May 24, 2002).

¹⁸ The Commission consented to the assignment of the licenses from Third Kentucky Cellular Corporation on December 21, 2001, and the parties consummated the assignment of the licenses on March 15, 2002. See File Nos. 0000606759 (assignment application) and 0000836534 (notice of consummation).

¹⁹ Extension Request at 3.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* Northstar states that the terms of the contract are "complete," although the contract will not be executed until RUS releases the contract specifications. Supplement at 1.

²³ Specifically, Northstar stated that, as of the end of March 2002, it has identified nine sites in the two BTAs that would provide more than the 25% coverage required under 47 C.F.R. § 24.203(b), executed leases for all nine sites, and completed construction on seven of the nine sites. In its May 8th supplement, Northstar added that it completed construction on the remaining two sites. Supplement at 1.

²⁴ Extension Request at 3.

²⁵ See, e.g., *Leap* at 19577 (granting a period of slightly less than 4 months for the markets in which Leap was introducing voice services); Telecorp PCS, LLC Request for Waiver of Section 24.203(a) of the Commission's Rules for Broadband PCS Licenses WPOI215 in the Louisville-Lexington-Evansville MTA and WPOI217 in the St. Louis MTA, *Order*, 16 FCC Rcd. 18917 (WTB Comm. Wir. Div. 2001) (granting an extension of 4 month).

extend the five-year construction requirement for Northstar's two licenses for a period of four months (*i.e.*, from April 28, 2002 to August 28, 2002).

7. Moreover, because the Northstar's service to rural areas is a critical component to grant of an extension, we do so on the condition that Northstar must, in addition to the 25 percent coverage benchmark, provide service to the portions of the BTAs that it has committed to serve in its request. Specifically, the licensee must, by August 28, 2002, provide coverage to (i) 25 percent of the population of each of the two BTAs, and (ii) to the towns listed in Attachment A. As with construction requirements in general, we require Northstar to notify the Commission no later than fifteen days following the deadline that it has met the requirements set forth herein.²⁶ Failure to meet either of these construction benchmarks will result in automatic termination of the particular license as of the new construction deadline.

8. Finally, as we have done with other extensions of time to meet the construction requirements,²⁷ we extend the restrictions on broadband PCS F-block licenses that were intended to coincide with the completion of the five-year construction requirement.²⁸ Specifically, section 24.839(a) of the Commission's rules prohibits the transfer of control or assignment of F-block broadband PCS licenses unless the filing of the application for assignment or transfer of control occurs five years after the date of the initial license grant or following the licensee's notification to the Commission that its five-year construction requirement has been satisfied.²⁹ Moreover, section 1.2111 of the Commission's rules requires that unjust enrichment payments be made to the Commission in circumstances in which F-block licenses are transferred or assigned prior to five years from the date of initial license grant.³⁰ Because both of these restrictions were intended to coincide with the licensee meeting the five-year construction requirement,³¹ we extend the prohibition of section 24.839 against the transfer of control or assignment of the instant licenses to non-eligible entities, and the unjust enrichment payment requirements of section 1.2111, until the licensee notifies the Commission that it has satisfied the construction requirements set forth herein with regard to each license individually.

9. Accordingly, IT IS ORDERED, pursuant to section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and sections 0.331, 1.925, and 1.946 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.925, 1.946, that the Request for Waiver and Extension of the Broadband PCS Construction Requirements filed by Northstar Technology, LLC on March 26, 2002 IS HEREBY CONDITIONALLY GRANTED IN PART to the extent provided herein.

²⁶ See 47 C.F.R. § 1.946(d).

²⁷ *See, e.g., Leap* at 19580-81.

²⁸ *See* Amendment of the Commission's Rules Regarding Installment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Sixth Report and Order and Order on Reconsideration*, 15 FCC Rcd. 16266, 16290-91 (2000) (*PCS Restructuring Order*).

²⁹ 47 C.F.R. § 24.839(a).

³⁰ 47 C.F.R. § 1.2111.

³¹ *PCS Restructuring Order* at 16290-91.

10. IT IS FURTHER ORDERED, pursuant to authority delegated by section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and by section 0.331 of the Commission's rules, 47 C.F.R. § 0.331, that the requirements of sections 1.2111 and 24.839 of the Commission's rules, 47 C.F.R. §§ 1.2111, 24.839, BE EXTENDED for the licenses that were the subject of the instant request until the licensee notifies the Commission that the construction requirements set forth herein have been met.

FEDERAL COMMUNICATIONS COMMISSION

Roger S. Noel
Deputy Chief, Commercial Wireless Division
Wireless Telecommunications Bureau

ATTACHMENT A

**Rural Communities/Towns Northstar Technology, LLC Proposes to Serve by the
End of the Extended Construction Period**

Middlesboro-Harlan, Kentucky BTA (BTA295)

Pineville, KY
Middlesboro, KY
Harrogate, TN
Tazewell, TN

Somerset, Kentucky BTA (BTA423)

Oak Hill, KY
Science Hill, KY
Bradley Branch, KY
Monticello, KY
West Somerset, KY